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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1197

L. P. STEUART, INC., *Petitioner*

v.

JOSEPH H. MATTHEWS, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent respectfully submits that the petition for a writ of certiorari should be denied for the following reasons:

(1) The question presented by Petitioner is inappropriate for review by this Court as it would require this Court to again review the sound judicial discretion of the District Court which exercise of dis-

cretion has already been affirmed as proper by the Circuit Court of Appeals.

(2) The District Court's order, affirmed by the Circuit Court of Appeals, is interlocutory in nature and presents no extraordinary situation requiring review by this Court at this juncture in the procedure, there being no final judgment.

(3) The relevant cases to the issue presented in the instant case present no real conflict of decisions.

JURISDICTION

The motion to reinstate this cause of action was addressed to the sound judicial discretion of the District Court which, after hearing all arguments of counsel for both sides, reinstated the cause of action after finding that the respondent should not be penalized for the lack of diligence of his then counsel and that this particular case rested upon its own facts and that Rule 60 (b) (6) of the Federal Rules of Civil Procedure applied.

Ordinarily application by a District Court of the Rules of Civil Procedure when affirmed by the Circuit Court of Appeals will not be reviewed by this Court. This is particularly true when the question is one that concerns the judgment of the District Judge in relation to a particular set of facts. *Appalachian Power Company* v. *American Institute of Certified Public Accountants*, 361 U.S. 887, 80 S. Ct. 16, 4 L. Ed. (2nd) 30.

This Court in the exercise of its discretionary power of review upon writ of certiorari considers whether the instant case is one in which "there are special important reasons" for the granting of said writ as re-

quired by Supreme Court Rule 19. *Rice* v. *Sioux City Cemetery*, 349 U.S. 71, 73, 75 S. Ct. 614, 99 L. Ed. 897. The granting of the writ of certiorari will be denied except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real an embarrassing conflict of opinion and authority between or among the Circuit Courts of Appeal. *Layne & Bowler Corp.* v. *Western Wellworks, Inc.*, 261 U.S. 387, 393, 42 S. Ct. 315, 66 L. Ed. 792.

The decision in this case presents no question of importance to persons other than to the particular litigants, and, the respondent respectfully submits that under the test laid down by Rule 19 of the Supreme Court rules, no reason exists for the granting of the petition for certiorari herein.

LACK OF FINALITY

The order entered by the District Court and affirmed by the Circuit Court of Appeals is manifestly non-final. It does not terminate the case but makes possible a hearing on the merits. It is an order which neither forecloses renewal nor prejudices renewal of herein Petitioner's point in issue once a final judgment has been rendered, after a trial on the merits. See *Cohen* v. *Beneficial Loan Company*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528.

This Court stated in *Cobbledick* v. *United States*, 309 U.S. 323, 324-25, 60 S. Ct. 540, 84 L. Ed. 783:

> "Finality is a condition of review and is a historic characteristic of appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right of any review at all".

In *American Construction Co. v. Jacksonville T. & K. W. R. Company*, 148 U.S. 372, 384, 13 S. Ct. 758, 37 L. Ed. 486, this Court stated:

> "This Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause".

Petitioner has made no suggestion that denial of certiorari at this juncture would "practically defeat the right of any review at all" at a later date or that "extra-ordinary inconvenience and embarrassment in the conduct of the cause" would result. The fact that the interlocutory order of the District Court was reviewed by the Circuit Court of Appeals pursuant to the Interlocutory Appeals Act, 28 U.S.C., Section 1292 (b) gives the petition no greater weight. Nothing in that statute or its legislative history indicates any congressional mandate to the Court to depart from the usual rule respecting review of interlocutory orders. Where, as here, the interlocutory order turns solely upon the discretion of the District Court and raises no other issue of general importance no reason for granting the writ of certiorari is apparent.

THERE IS NO REAL CONFLICT OF DECISION

There is no real conflict between the decision of the lower court and the decisions of this Court in *Klapprott v. United States*, (1949), 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266; *Ackerman v. United States* (1950), 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207 and *Link v. Wabash Railroad Company* (1962), 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 734.

Petitioner in the instant case maintains that *Klapprott*, supra, holds that relief under Rule 60-(b) (6) of the Federal Rules of Civil Procedure can be afforded only when the movant can demonstrate to the Court "extra-ordinary circumstances". Respondent in the *Klapprott* case (who stands in the position analogous to Petitioner in the instant case) contended that Klapprott had shown at most, "excusable neglect" and that he could not avail himself of the broad "any other reason" clause of 60 (b) (6). To this contention this Court at Page 613, said:

> * * * "petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part."

Clearly, this Court did not hold that relief under 60 (b) (6) could be had only where there were "extraordinary circumstances." Indeed in the *Klapprott* case this Court aptly summarized the test for relief under 60 (b) (6) when at pages 614-15, it stated:

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Petitioner in the instant case also relies upon this Court's decision in *Ackerman*, supra, which is both consistent with this Court's holding in the *Klapprott* case, supra, and clearly distinguishable from the instant case. In *Ackerman*, the petitioner (who analogously stands in the position of respondent in the instant case) had been granted a trial on the merits which proceeding resulted in a finding adverse to him. Ackerman failed to note an appeal from the trial finding adverse to him. Ackerman eventually filed a

motion to set aside the adverse judgment under Rule 60 (b) (6). His motion was denied and the denial was affirmed. After granting him a hearing this Court in denying his petition for relief under 60 (b) (6) this Court stated on Page 200:

> "By no stretch of imagination can the voluntary, deliberate, free, untrammeled choice of petitioner not to appeal compare with the Klapprott situation.
>
> * * * Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within Klapprott *or* Rule 60 (b) (6)." Page 263. (Italics supplied)

It is made manifestly clear from the last above quoted excerpt from the *Ackerman* case, that while Ackerman did not present the "extraordinary circumstances" which are the foundation of the *Klapprott* holding, neither did he make out a persuasive case for relief under the "other reason" clause of 60 (b) (6). Those decisions therefore, are mutually consistent with each other. It is equally clear that the *Ackerman* holding is distinguishable from the instant case for in that case, Ackerman was given a trial on the merits, whereas Mr. Matthews of the instant case has never had his day in court and the instant petitioner, L. P. Steuart, Inc., seeks to deny him that day in court.

Petitioner in the instant case also relies upon the *Link* case, supra, as dispositive of the issue raised under Rule 60 (b) (6). Respondent in the instant case contends that the *Link* case is not in conflict with the order entered by the District Court and affirmed by the Circuit Court of Appeals in the instant case. Respondent, indeed, contends that the *Link* decision is inapposite to the issue raised by the petitioner herein as

Rule 60 (b) (6) was not reviewed by this Court in the *Link* case, supra. In *Link* there was a dismissal under Rule 41 (b) of the Federal Rules of Civil Procedure, followed by an appeal from that dismissal. No motion was made under Rule 60 (b) (6) and that rule was never before this Court in *Link*. In the *Link* case this Court reviewed whether or not there was an abuse of discretion on the part of the District Court or error on the part of the Circuit Court of Appeals in finding no abuse of discretion and therefore affirming the District Court. This Court on Page 632 stated:

> "The availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60 (b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60 (b)." * * *
>
> "Nor need we consider whether the District Court would have been abusing its discretion had it rejected a motion under Rule 60 (b) * * * No such motion was ever made, so that there is nothing in the record before us to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect."

Respondent in the instant case (who analogously stands in the position of petitioner in the *Link* case, supra), did avail himself of the escape hatch provided by Rule 60 (b) (6) and the District Court in the exercise of its sound judicial discretion reinstated the cause of action. Upon appeal to the Circuit Court of Appeals, it concluded that the District Court did not abuse its discretion and that reinstatement was appropriate to accomplish justice.

It is respectfully submitted that the *Link* case, supra, bears no pertinency to the instant case.

CONCLUSION

No abuse of discretion by the District Court in this case has been demonstrated, and under the facts there presented, the Circuit Court of Appeals agreed. For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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